
(1919) 06 PAT CK 0005
In the Patna High Court

Maharaia Kesho Prasad Singh Bahadur	APPELLANT
Vs	
Harbans Lal and Others	RESPONDENT

Date of Decision : 05-06-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Section 15, 3

Citation : 53 Ind. Cas. 85

Hon'ble Judges : Jwala Prasad, J;Adami, J

Bench : Division Bench

Judgement

Jwala Prasad, J.—The appellant obtained a mortgage decree against one Debi Lal on 7th September 1905. He made several executions of the said decree but without being able to realise the decretal amount. We are concerned only with the execution of the decree taken out just previous to the present execution, namely, on the 9th April 1914, which was No. 143 of 1914. The original judgment-debtor Debi Lal was dead and this execution was, therefore, taken out against his heirs, Maluk Chacd Lal, son of Lachhmi Lal, and Harbans Lal, Isri Lal and Bhagwan Lal, sens of Bahoran Lal. The decree holder prayed for the realisation of the decretal amount by sale of 19 plots of land, 13 of which appertain to khata No. 151 and 7 to khata No. 152. Only three of these plots, namely, Nos. 3090 and 2074 of khata No. 151 and No. 2298 of khata No. 152 were the mortgaged properties.

2. Notice under Order XXI, Rule 22, was issued upon the aforesaid judgment-debtors. This notice was served personally upon one of the judgment-debtors, Maluk Chand Lal, and as regards the other three the peon reported that they were not in the village and that he affixed the notice upon their houses.

3. On the 19th May 1914, the Court noted in the Order Sheet "Notice served," and directed the notice under Order XXI, Rule 66, to issue. This notice was not served personally upon any of the judgment-debtors, and the peon who was entrusted with the service of this notice reported on the 28th May that he could

not find any of the judgment-debtors and hence he posted the notice on their houses.

4. On remand the Courts below have held that the notice under Order XXI, Rule 22, was served personally upon Maluk Chand Lal, but that it was not properly served upon the other three judgment debtors, and hence, in spite of the note of the Court referred to above in the Order Sheet of the 14th May 1914, it must be accepted as a conclusive finding of fact that the notice under Order XXI, Rule 22, was not properly served upon three of the judgment debtors, Harbans Lal, Isri Lal and Bhagwan Lal. This becomes important in view of the fact that Maluk Chand Lal is dead and the present execution is against the other judgment-debtors Harbans Lal, Isri Lal and Bhagwan Lal.

5. On 25th June 1914 the decree-holder filed forms of sale proclamation, which was ordered to be issued fixing the 7th September 1914 for sale of the properties. On the 6th August 1914 Maluk Chand Lal filed a petition u/s 47 of the CPC objecting to the sale of the properties other than those mortgaged. This gave rise to Miscellaneous Case No. 115 of 1914, and it was fixed for hearing for the 4th September, with the object that it might be disposed of before the date fixed for the sale, namely, the 7th September.

6. On the 4th September, the decree-holder applied for time on the ground that the other objection cases were fixed for the 12th September and also on the ground that the agent of the decree-holder was busy in certain tamadi cases, and the case was accordingly adjourned to the 12th September and was ordered to be "put up with claim cases."

7. On the 12th September apparently the other claim cases were adjourned and the Court passed the following order:---"Put up on 21st November 1914, for want of time, both Execution Case No. 143 of 1914 and Objection Case No. 115 of 1914 and Claim Cases Nos. 34 to 41 of 1914."

8. On 21st November 1914, the decree-holder put in a petition admitting the claim of the objectors-judgment-debtors and praying that only the mortgaged properties, namely the three plots mentioned above, be sold first. The Court accordingly allowed the objection and directed that the rest of the properties be released from the proceedings. This order of the Court is contained in Order No. 13 on the Order Sheet. Order No. 14 on the Order Sheet relates to the costs to be paid by the appellant to the judgment-debtor-objector. Order No. 15 on the Order Sheet of the same date relates to the Execution Case No. 143 and is in the following words:---"No steps taken by the decree-holder to-day. The case is dismissed for default."

9. The present application for execution was filed on the 3rd September 1917 and was numbered 156 of 1917, but as the copies of khatian and decree were not filed, the decree holder was directed by an order on the back of the execution petition, dated the 3rd September, to file the same. The said copies were, however, filed on the 20th September and the application was registered

on that date with an order to issue notice under Order XXI, Rule 22, fixing the 13th November 1917. The execution was against Maluk Chand Lal and the aforesaid three persons Harbans Lal, Isri Lal and Bhagwan Lal, Maluk Chand Lal was reported to be dead, and as regards the others it was stated in the report of the peon that Harbans Lal and Bhagwan Lal took the notice but refused to give receipt for the same, and that Isri Lal was serving in Calcutta and hence his notice was given to his brother Bhagwan Lal, who refused to give receipt for the same. The decree-holder applied that Harbans Lal, Isri Lal and Bhagwan Lal be substituted in place of Maluk Chand Lal deceased as his heirs and legal representatives, and filed affidavit as to the service of notice upon the other judgment debtors.

10. On the 15th December 1917, the Court made the following order: "Notice served and proved against all the judgment-debtors, save and except Maluk Chand Lal who is reported to be dead, On decree-holder's petition let Harbans Lal, Isri Lal and Bhagwan Lal be substituted in place of the deceased judgment debtor, amendment be made and notice be issued against them fixing 8th January 1918 to shew cause whether they have any objection to be made his heirs."

11. This notice was issued under Order XXI, Rule 22, and the peon reported that he met Harbans Lal alone and that he handed all the three notices to him. An affidavit to that effect was also filed by a servant of the decree-holder. On 8th January 1918 the Court passed the following order:---"Notice served and proved. Process fee filed. Decree-holder to file forms duly filled up. Put up on 14th January."

12. On 14th January the Court made the following order:---"Forms filed. Issue attachment, fixing 12th February 1918."

13. On 12th February 1918 the Court passed the following order:---"Attachment served. Petition of no incumbrance along with process fee and forms filed. Issue notice under Order XXI, Rule 66, fixing 14th March 1918."

14. In the meantime, on the 7th February, one of the judgment-debtors, Harbans Lal, filed an objection to the execution of the decree on, amongst others, the ground that it was barred by limitation. His petition was numbered 14 of 1918. The Subordinate Judge upheld the objection of the judgment-debtor on the ground that the last step taken by the decree-holder in aid of the execution was on June 25th, 1914, when he filed forma for the sale proclamation in Execution Case No. 143 of 1914. The present application filed on the 3rd September 1917 was out of time. The execution was accordingly dismissed. Against the said order the decree-holder appealed to the learned District Judge of Shahabad contending that the present execution was not barred by limitation. His contention was based on three grounds: (1) that the previous execution was dismissed on the 21st November 1914, and the present execution was in continuation of the previous one; (2) that the decree-holder is entitled to deduction of the time from

the 12th September 1914, when the sale was stayed by the order of the Court pending the disposal of the objection filed by the judgment-debtors, up to the 24th November 1914, when the claim case of the judgment-debtors was disposed of, and (3) that the order of the Court of the 14th January 1918 in the present execution, directing the attachment to issue, was a determination between the parties that the decree was capable of execution and that it was not barred by limitation and hence, upon the authority of the Privy Council in the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* 8 C. 51 : 11 C. L. T. 113 : 8 I. A. 123 : 4 P. C. J. 249 : 4 Ind. Dec. 32 (P. C.) and the subsequent authorities of the various High Courts, the said order operates as *res judicata* between the parties and cannot be now reopened. All these objections were decided by the Court below against the decree-holder. In appeal the same points have been raised. There does not appear to be any substance in any of these contentions.

15. As to the first contention, the present application for execution on the 3rd September 1917 cannot in any way be said to be one in continuation of the previous application which was dismissed on the 21st November 1914. Reliance has been placed upon the case of *Madhab Moni Dasi v. Pamela Lambert* 6 Ind. Cas. 537 : 37 C. 796 : 12 C. L. T. 328 : 15 C. W. N. 337. In that case it was held that when the sale was subsequently set aside, the parties were restored to the position which they would have occupied if the sale had never taken place, and the order of the 17th December dismissing the application of the decree-holder for an order absolute was proved by the subsequent events to be erroneous. The subsequent applications in 1909 and 1910 of the decree-holder for an order absolute must be considered to be a continuation or revival of the previous application of the 19th December 1908. It was further observed in that case that the subsequent application may be treated as a continuation or revival, "the consideration of which has been interrupted by the intervention of objections and claim subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction". This ruling has no application to the present case where the objection of the judgment-debtor in the previous Execution Case No. 143 of 1914, that the decree holder was not entitled to proceed with the properties other than the mortgaged properties, was upheld and the execution case was dismissed on account of the default of the decree-holder in not taking any step to proceed against the mortgaged properties. A subsequent application for execution can only be regarded as a continuation of the former one when the latter is dismissed without any fault or laches on the part of the decree-holder in the prosecution of the execution, and the subsequent application is in all respects similar in scope and character to that of the former one. The previous application of the decree-holder of 1914 having been dismissed on account of his failure to proceed with, the mortgaged properties and on account of his not taking any step in the prosecution of the said execution, the present application of the 3rd September 1917 is not a continuation of the former one. The relief sought in the present application to sell the mortgaged properties is not the same as in the former application where the prayer was to sell the other properties as well as

the mortgaged properties: Krishna Dayal Gir v. Sakina Bibi 34 Ind. Cas, 27 : 1 P. L. J. 214 : 20 C. W. N. 952 : 2 P. L. W. 370. This contention of the decree-holder must, therefore, be Overruled.

16. The next contention of the decree holder is that he is entitled to a deduction of the time from the 12th September 1914, when the Court ordered the sale to be stayed, up to the 24th November 1914, when the claim case of the judgment debtors was disposed of. This contention is raised upon Section 15 of the Limitation Act. Under that Section a decree holder is entitled to a deduction of the time during which the execution of his decree is stayed by an injunction or an order. In the first place, the execution of the decree in the present case was not at all stayed by any order of the Court. There was no claim with respect to the mortgaged properties by the judgment-debtors and, as a matter of fact, the decree-holder on the 21st November 1914 admitted the claim of the judgment-debtors and prayed for the sale only of the mortgaged properties. This he could have done long before and the sale would not have been stayed, The Court had fixed the 4th of September for disposal of the claim of the judgment-debtors with respect to the properties other than the mortgaged properties expressly with the object of disposing of the objection before the 7th September, the date fixed for the sale. The disposal of the objection was, on the 4th September, adjourned upon the application of the decree-holder and it was at his request that the claim case in that execution was made analogous with the other claim cases. On the 12th September the other claim cases were not disposed of and the Court was, therefore, bound to postpone the hearing of the claim case till then, and in the meantime to stay the sale. The stay of the sale of the mortgaged properties was, therefore, due entirely to the decree-holder and the order of the 12th September staying the sale cannot, therefore, be considered to be a legal stoppage of the execution proceedings. The decree-holder is not, therefore, entitled to a deduction of the time between the stay of the sale and the disposal of the claim case: Narayana Nambi v. Pappi Brahman 10 M. 22 : 3 Ind. Dec. 766. This contention must, therefore, also be overruled.

17. The last contention of the decree-holder is that the order of the Court in the present execution of the 14th January 1918 directing the attachment to issue was a determination between the parties, that the decree was capable of execution and that it was not barred by limitation, and hence the judgment-debtors are debarred from reopening the question and contending that the execution of the decree was barred by time. In the case of Mungul Pershad Dichit v. Girja Kant Lahiri 8 C. 51 : 11 C. L. T. 113 : 8 I. A. 123 : 4 P. C. J. 249 : 4 Ind. Dec. 32 (P. C.) and in all subsequent cases the objection of the decree being debarred by time was taken in subsequent executions of the decree when in the previous executions of the same decree the Court had, upon notice being served upon the judgment-debtor under Order XXI, Rule 22, ordered the execution to proceed, but in none of those cases was it held that the objection on the score of limitation cannot be entertained when it is taken at the subsequent stage of the same pending execution. On the other hand, in the case of Sardar v. Fatteh

Chand 89 P. R. 1894 it was expressly held that the judgment debtor can raise the said objection to the execution of the decree at a later stage of the same execution proceedings when his objection was disallowed or not pressed at the earlier stage of the execution. That case was referred to with approval in the case of Bisheswar Dayal v. Rup Kishore 41 Ind. Cas. 675 : 8 P. L. W. 13 (Miscellaneous Appeal No. 332 of 1916), though it could not be applied to the facts of the latter case.

18. Thus, even if the order of the Court of the 8th January be considered to be a determination that the execution was valid and not barred by time, it was open to the judgment-debtors to object to the execution being time-barred on the 14th January 1918. This is so because the order passed under Order XXI, Rule 22, is not appealable. The Court's duty was at any stage of the execution proceeding to dismiss the execution on the ground that it was barred by limitation. This duty is imposed by Section 3 of the Limitation Act even when the ground is not taken by the judgment-debtor. It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take the objection of limitation in a subsequent execution of the decree. But so long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred and the Court will have no option but to dismiss the application u/s 3 of the Limitation Act. I, therefore, hold that the objection of the judgment-debtors of the 14th January was fit to be entertained.

19. It is also doubtful, as observed by the learned Judge, whether the order of the 8th January directing the decree-holder to file process of attachment can "amount to a judicial finding that everything about the execution proceeding is in order."

20. Agreeing, therefore, with the views taken by the Courts below, we dismiss the appeal with costs throughout.

Adami, J.

21. I agree.